

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION**

**PERFORMANCE ENERGY SERVICES,
LLC**

Plaintiff,

V.

**ORYX DELAWARE OIL GATHERING
NM LLC,**

Defendant.

CASE NO. 7:19-cv-55

COMPLAINT

Performance Energy Services, LLC (“Performance Energy”) hereby files its Complaint against Oryx Delaware Oil Gathering NM LLC (“Oryx”) and in support thereof shows as follows:

I.
PARTIES

1. Performance Energy is a Colorado limited liability company, with its principal office in Brighton, Colorado.

2. Oryx is a Delaware limited liability company authorized to do business in Texas with its principal place of business in Midland, Texas. Oryx may be served with process through its registered agent Brett Wiggs, 4000 N. Big Springs Street, Suite 400, Midland, Texas 79705.

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 as there exists complete diversity of citizenship between Performance Energy and Oryx and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

4. The Court has personal jurisdiction over Oryx because Oryx's principal place of business is in Midland, Texas.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1).

III.
FACTUAL BACKGROUND

6. On or about September 11, 2018, Oryx requested a proposal from Performance Energy on its Carlsbad Gathering – South 12" PL Construction Project (the "Project"). Performance Energy provided a proposal (the "Proposal") on the Project to Oryx on September 13, 2018.

7. The Project encompassed the construction of a 14-16 mile underground pipeline for the transportation of oil and gas, a portion of which would go beneath the Black River ("the Black River Section").

8. On September 25, 2018, Performance Energy and Oryx entered into a Master Service Agreement (the "MSA") pursuant to which Performance Energy's name was added to the list of approved contractors for Oryx.

9. On October 10, 2018, Oryx notified Performance Energy pursuant to Task Order # PCGS-TO11 (the "Task Order") that Oryx had selected Performance Energy to provide construction services to Oryx related to the Project.

10. Performance Energy accepted the Task Order on October 12, 2018.

11. All work done under the Task Order was to be in accordance with, among other things, the Oryx Midstream Standard Fabrication Drawings (each an "Alignment Sheet"), the Proposal, and the MSA. The Task Order further provided that Performance Energy would be paid "based on installed, filed measured quantities as identified by Oryx...and mutually agreed

upon by Performance Energy...or its representative.” Additionally, Oryx agreed to pay Performance Energy within 30 days of receiving an invoice.

12. Performance Energy commenced work on the Project on October 15, 2018, pursuant to an Alignment Sheet which specified Performance Energy use pipe with a wall thickness of 3/8 of an inch for the Black River Section.

13. On October 17, 2018, Oryx issued a revised Alignment Sheet that specified Performance Energy use pipe with a wall thickness of 1/4 of an inch for the Black River Section.

14. On October 29, 2018, a bore profile was issued for the Black River Section by Oryx’s Engineer which specified Performance Energy use pipe with a wall thickness of 3/8 of an inch for the Black River Section.

15. On November 8, 2018, Oryx issued another revised Alignment Sheet which again specified that Performance Energy use pipe with a wall thickness of a 1/4 of an inch for the Black River Section.

16. On December 17, 2018, Gary Dyas and George Pappadopolis directed Performance Energy’s on site personnel to use pipe with a wall thickness of a 1/4 of an inch for the Black River Section. As this direction met with the latest Alignment Sheet, Performance Energy prepared the pipe for placement in the Black River Section.

17. On December 18, 2018, Performance Energy presented Invoice ORY #1-5 in the amount of \$967,566.19 to Oryx for payment. Oryx approved the work done for this invoices, but has not paid this invoice.

18. On December 19, 2018, Oryx inspected the pipe Performance Energy intended to use for the Black River Section and Oryx approved the pipe for hydro testing.

19. On December 30, 2018, Performance Energy hydro tested the pipe under the supervision of the Oryx inspector for use in the Black River Section and Oryx reported that the pipe passed the hydro testing.

20. On January 4, 2019, Performance Energy presented Invoice ORY #1-6 in the amount of \$621,829.19 to Oryx for payment. Oryx approved the work done for this invoices, but has not paid this invoice.

21. Between January 7, 2019 and January 12, 2019, the bore was drilled for the Black River Section of the Project.

22. On January 13, 2019, as Performance Energy was preparing to place the pipe in the Black River Section, it was informed that a new Alignment Sheet had been issued which required the Black River Section be completed using pipe with a wall thickness of 3/8 of an inch.

23. On January 16, 2019, due to the last minute change on the size of the pipe to be used in the Black River Section, Performance Energy submitted a change request (the “Change Request”) to rework the pipe for the Black River Section in accordance with the January 13, 2019 Alignment Sheet. Oryx responded to this request by questioning whether Performance Energy had followed instructions provided in the Alignment Sheets.

24. Also on January 16, 2019, Performance Energy presented Invoice ORY #1-7 in the amount of \$1,238,685.11 to Oryx for payment. Oryx approved the work done for this invoices, but has not paid this invoice.

25. On January 18, 2019, Performance Energy confirmed that it had followed the instructions in the Alignment Sheets and requested a response to the Change Request. Performance Energy further notified Oryx that it could not move forward without approval of the Change Request and that delay in approval of the Change Request would result in Oryx incurring

costs associated with standby time for the rigs used on the Black River Section and possible demobilization of the rigs to other jobs. Oryx did not respond to the Change Request on January 18, 2019 or January 19, 2019.

26. On January 20, 2019, Performance Energy again requested a response to the Change Order. Oryx responded that Performance Energy did not need approval of the Change Order and that it should simply follow the January 13, 2019 Alignment Sheet, notwithstanding the immense additional costs that would be incurred by Performance Energy in undertaking the correction, for which Performance Energy had no assurance of payment from Oryx.

27. Because Oryx failed to approve the Change Request, Performance Energy demobilized the rig from the Black River Section on January 21, 2019.

28. On January 28, 2019, Oryx sent Performance Energy a letter purporting to terminate the Task Order and the MSA and ordering Performance Energy to vacate the Project.

29. On January 31, 2019, Performance Energy presented Invoice ORY #1-8 in the amount of \$1,195,528.34 and Invoice #1-9 in the amount of \$643,276.33 to Oryx for payment. On the same date, Performance Energy realized that it had miscoded two of the expenses on ORY #1-8. Performance Energy submitted a change request on January 31, 2019, seeking to correct the coding error which resulted in an increased in the amount of \$111,916.00 for ORY #1-8. Oryx approved the work done for these invoices, but has not paid these invoices.

30. As a result of Oryx's delay in responding to the Change Request, Performance Energy incurred the following expenses which have not, as of yet, been invoiced: (a) a rework of the bore of the Black River Section for \$31,538.00; (b) disassembly of the previously constructed pipe for \$263,996.00; (c) standby time for equipment leased for use in the Black River Section for \$138,600.00; (d) taxes due on the leased equipment for \$33,193.00; (e) boring

an additional part of the Project for \$65,912.00; (f) stand by time for equipment leased for use on additional sections of the Project for \$99,000.00; and (g) taxes due on the leased equipment for \$12,609.00 (collectively the “Change Requests Expenses”).

31. Despite repeated requests by Performance Energy to Oryx for payment, Oryx continues to fail and refuses to pay the amounts due and owing.

IV.

COUNT 1 – BREACH OF CONTRACT INVOICES ORY #1-5 – ORY #1-7

32. Performance Energy repeats and realleges each and every allegation set forth in the foregoing paragraphs as though fully set forth herein.

33. The MSA and the Task Order constituted valid contracts between Performance Energy and Oryx. Performance Energy performed all of the work listed on Invoices ORY#1-5, ORY #1-6, and ORY #1-7.

34. Oryx has approved all of the work performed by Performance Energy listed on Invoices ORY #1-5, ORY #1-6, and ORY #1-7.

35. Oryx’s obligation to pay is a material term of both the Task Order and the MSA.

36. Oryx has failed and refused to pay for the amounts listed on Invoices ORY #1-5, ORY #1-6, and ORY #1-7.

37. Oryx’s failure to pay constitutes a material breach of contract.

38. As a result of Oryx’s breach of contract, Performance Energy has sustained financial harm and has lost benefits expected to be received from the MSA and the Task Order if Oryx had performed as promised. In connection with this, Performance Energy has performed all work set forth in Invoices ORY #1-5, ORY #1-6, and ORY #1-7. The value of the work performed was not less than \$2,828,080.49.

39. Between December 1, 2018 and January 31, 2019 Performance Energy presented its claims for payment for the amounts due under the MSA and the Task Order. Because Oryx has failed and refused to honor the claim and pay the just amount due as promised, Performance Energy seeks judgment against Oryx for \$2,828,080.49 in damages.

V.

COUNT 2 – BREACH OF CONTRACT INVOICE ORY 1-8

40. Performance Energy repeats and realleges each and every allegation set forth in the foregoing paragraphs as though fully set forth herein.

41. The MSA and the Task Order constituted valid contracts between Performance Energy and Oryx. Performance Energy performed all of the work listed on Invoice ORY #1-8.

42. Oryx's obligation to pay is a material term of both the Task Order and the MSA.

43. Oryx has failed and refused to pay for the amounts listed on Invoices ORY #1-8.

44. Oryx's failure to pay constitutes a material breach of contract.

45. As a result of Oryx's breach of contract, Performance Energy has sustained financial harm and has lost benefits expected to be received from the MSA and the Task Order if Oryx had performed as promised. In connection with this, Performance Energy has performed all work set forth in Invoices ORY #1-8. The value of the work performed was not less than \$1,307,444.34.

46. On January 31, 2019 Performance Energy presented its claims for payment for the amounts due under the MSA and the Task Order. Because Oryx has failed and refused to honor the claim and pay the just amount due as promised, Performance Energy seeks judgment against Oryx for \$1,307,444.34 in damages.

VI.

COUNT 3 – BREACH OF CONTRACT INVOICE ORY#1-9

47. Performance Energy repeats and realleges each and every allegation set forth in the foregoing paragraphs as though fully set forth herein.

48. The MSA and the Task Order constituted valid contracts between Performance Energy and Oryx. Performance Energy performed all of the work listed on Invoice ORY #1-9.

49. Invoice ORY #1-9 seeks payment of contractual retainage for Invoices ORY #1-1 through ORY #1-8.

50. Oryx has approved all of the work performed by Performance Energy listed on Invoices ORY #1-1 through ORY #1-8; however, Oryx management has failed and refused to pay the amounts listed on ORY #1-9.

51. Oryx's obligation to pay is a material term of both the Task Order and the MSA.

52. Oryx has failed and refused to pay for the amounts listed on Invoice ORY #1-9.

53. Oryx's failure to pay constitutes a material breach of contract.

54. As a result of Oryx's breach of contract, Performance Energy has sustained financial harm and has lost benefits expected to be received from the MSA and the Task Order if Oryx had performed as promised. In connection with this, Performance Energy has performed all work set forth in Invoices ORY #1-9. The value of the work performed was not less than \$643,276.33.

55. On January 31, 2019 Performance Energy presented its claims for payment for the amounts due under the MSA and the Task Order. Because Oryx has failed and refused to honor the claim and pay the just amount due as promised, Performance Energy seeks judgment against Oryx for \$643,276.33 in damages.

VII.
COUNT 4 – QUANTUM MERUIT

56. Performance Energy repeats and realleges each and every allegation set forth in the foregoing paragraphs as though fully set forth herein.

57. Alternatively, Performance Energy asserts a claim for quantum meruit. Invoices ORY #1-5 through #1-9 and the forms describing the Change Request Expenses detail the services rendered and materials delivered directly to Oryx in connection with the Project.

58. As a direct result of Performance Energy's rendition of services and provision of materials, benefits were conferred on Oryx in the completion of the Project.

59. Oryx has accepted the benefits of Performance Energy's services and materials, but has failed and refused to pay for them. Invoices ORY #1-4 through ORY #1-9 and the Change Request Expenses each reflect services and materials performed and/or provided by Performance Energy to Oryx and Oryx accepted those benefits.

60. As a result of Oryx's non-payment, Performance Energy has been damaged and is entitled to recover the reasonable value of the services and materials provided.

61. The reasonable value of the services and materials provided by Performance Energy to Oryx was \$5,423,649.16.

VII.
COUNT 5 – CONDITIONS PRECEDENT

62. All conditions precedent have been performed or have occurred.

IX.
JURY DEMAND

63. Performance Energy demand a trial by jury.

WHEREFORE, Performance Energy requests that Oryx be cited to appear and answer, and that the Court:

A. Enter judgment in favor of Performance Energy and against Oryx on all counts;

- B. Award Performance Energy damages against Oryx in the principal amount of \$5,423,649.16;
- C. Award Performance Energy pre-judgment and post-judgment interest on the damages at the maximum amount allowed under law; and
- D. Award Performance Energy such other and further relief as the Court find just.

Respectfully submitted,

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